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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

AARON ZACKS AND FLORENCE ZACKS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

OPINION BELOW

The opinion of the Court of Claims (Appendix B, *infra*, pp. 22–26) is reported at 280 F. 2d 829.

JURISDICTION

The judgment of the Court of Claims was entered on July 6, 1962. (Appendix B., *infra*, p. 27.) On October 4, 1962, by order of the Chief Justice, the time within which to file a petition for a writ of certiorari was extended to and including December 3, 1962. The jurisdiction of the Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether a retroactive tax relief measure applicable to years otherwise barred by the statute of limitations must be deemed by implication to reopen the limitations period even though it does not expressly so provide.

STATUTES INVOLVED

Section 1 of the Act of June 29, 1956, c. 464, 70 Stat. 404, Section 322(b)(1) of the Internal Revenue Code of 1939, and Section 7422(a) of the Internal Revenue Code of 1954, are set forth in Appendix A, *infra*, pp. 19–21.

STATEMENT

1. Section 117(q) of the Internal Revenue Code of 1939, enacted June 29, 1956 (by Section 1 of P.L. 629, c. 464, 70 Stat. 404) provided that a transfer of all substantial rights to a patent by any individual whose efforts created such property shall be treated as the sale or exchange of a capital asset held for more than six months, whether or not the consideration is received in the form of royalties. (Appendix A, *infra*, p. 19). Although the substantive meaning and application of Section 117(q) are not at issue here, a brief summary of its background is necessary to an understanding of the case.

In 1946, the Commissioner announced his acquiescence in *Edward C. Myers*, 6 T.C. 258, a Tax Court decision holding that the granting of an exclusive license of all rights under a patent constituted the sale or exchange of a capital asset. 1946–1 Cum. Bull. 3. Later, on March 20, 1950, he withdrew the acquiescence, substituted a nonacquiescence, and announced that he would not accord capital gains treatment to

royalties under such a license in tax years beginning after May 31, 1950. Mim. 6490, 1950–1 Cum. Bull. 9. Despite the nearly unanimous rejection of this position by the courts, the Commissioner strenuously adhered to it in the years that followed. Congress ultimately resolved the problem prospectively in Section 1235 of the 1954 Code, which provided, for 1954 and subsequent years, that an inventor or "holder" of a patent might obtain capital gains treatment upon the transfer of all substantial rights under the patent, even though payment was in the form of royalties. Thereupon, the Commissioner issued another ruling, Rev. Rul. 58, 1955–1 Cum. Bull. 97, announcing that he would continue to apply his 1950 ruling to payments received in taxable years beginning after May 31, 1950, and before January 1, 1954, the period not covered by Section 1235. To settle the controversy for that period, Congress in 1956 retroactively amended the 1939 Code by adding Section 117(q), which in substance made applicable to taxable years beginning after May 31, 1950, the rule established for later years by the 1954 Code. See *Coplon* v. *Commissioner*, 28 T.C. 1189, 1191; H. Rep. No. 1607, 84th Cong., 1st Sess., pp. 1–2 (1956–2 Cum. Bull. 1226); S. Rep. No. 1941, 84th Cong., 2d Sess., pp. 4–5 (1956–2 Cum. Bull. 1227, 1229–1230); H. Conf. Rep. No. 2253, 84th Cong., 2d Sess., p. 5 (1956–2 Cum. Bull. 1234, 1236). See also S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 438–441 (3 U.S.C. Cong. and Adm. News (1954) 4621, 5081–5084), accompanying the passage of Section 1235 of the 1954 Code.

2. In 1952, Florence Zacks received royalties from a manufacturing corporation to which she had trans-

ferred all substantial rights under patents granted on certain clothing items she had originated. These royalties, amounting to about $37,000, were reported as ordinary income in the 1952 joint income tax return filed by Mrs. Zacks and her husband, Aaron Zacks ("taxpayers") on April 15, 1953. (R. 1–2, 6.) The last payment of 1952 income tax was made on or before September 28, 1953. (R. 2, 7.) The statute of limitations normally applicable to a claim for refund of the taxpayers' 1952 taxes would accordingly have expired on April 15, 1956, three years from the date the return was filed (Section 322(b)(1), Internal Revenue Code of 1939).

On June 23, 1958, taxpayers filed a claim for refund of 1952 income tax on the ground that the aforesaid royalties were taxable under Section 117(q) as long-term capital gain rather than ordinary income. On March 5, 1959, no action having been taken on their claim, they filed a petition in the Court of Claims on the same ground, seeking a refund of $10,636.06 plus interest. (R. 1–4.)

In its answer the United States asserted as one of its defenses that the Court of Claims had no jurisdiction over the refund suit because the claim for refund had not been filed within three years of the filing of the return or within two years of the payment of the tax, as required by Section 322(b)(1) of the Internal Revenue Code of 1939 (Appendix A, *infra*, p. 20), and that the suit was therefore barred by Section 7422(a) of the Internal Revenue Code of 1954 (Appendix A, *infra*, pp. 20–21). (R. 7–8.)

Taxpayers filed a motion (R. 9) to strike the defense of the statute of limitations, and, on July 15, 1960, the Court of Claims issued a decision granting the motion and returning the case to the trial commissioner for further proceedings (Appendix B, *infra*, pp. 22–26). (R. 7–8.)

There followed a trial on the merits. Although a portion of the royalties in question admittedly qualified for long-term capital-gain treatment under Section 117(q), the parties were in dispute as to the extent to which the balance constituted consideration for the transfer of the patent rights or compensation for Mrs. Zacks' services as a designer. After the trial was concluded, but before the filing of the trial commissioner's report, the factual dispute was compromised by a stipulation between the parties that $15,035.98 of the 1952 royalities were received in exchange for the transfer of the patent rights. The stipulation, which also resolved the remaining minor issues in the case, fixed the amount of taxpayers' recovery at $4,624.09, plus interest (assuming that the refund claim was timely), but expressly reserved to the United States the right to seek review in this Court of the timeliness of the taxpayers' claim for refund and subsequent suit. (Appendix B, *infra*, pp. 29–30.) On July 6, 1962, the Court of Claims entered judgment on the stipulation, reciting that "plaintiffs agreed to accept the sum of $4,624.09, with interest thereon as allowed by law, in full settlement of all claims set forth in the petition, without prejudice, however, to defendant's right to file a petition

for certiorari in the Supreme Court to review the question whether plaintiffs' claim for refund and suit herein were timely filed, and the defendant consented to the entry of judgment in that amount and upon such condition." (Appendix B, *infra*, p. 27.)

In holding that the refund claim was timely, the Court of Claims ruled that enactment of Section 117(q) created a new cause of action and therefore a new period of limitations. It reasoned that "at least insofar as taxable years barred by the statute of limitations are concerned, Congress intended by the passage of Public Law 629 to give taxpayers a right which they did not have before its passage," and that, had Congress not so intended, "it was an idle gesture to have made [Public Law 629] applicable to years as far back as 1950." (Appendix B, *infra*, p. 25.)

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Claims in this case is in conflict with the decisions of the Fifth Circuit in *Tobin* v. *United States*, 264 F. 2d 845,[1] and the Sixth Circuit, *per curiam*, in *United States* v. *Dempster*, 265 F. 2d 666, certiorari denied, 361 U.S. 819.[2] All of these cases involved the same issue, *i.e.*, whether refund claims grounded on Section 117(q)

[1] The Fifth Circuit recently adhered to this decision in *Tobin* v. *Tomlinson*, No. 19173 (Nov. 21, 1962), which involved a subsequent refund claim by the same taxpayer.

[2] The decision in *Zacks* is also in conflict with *Vaughn* v. *United States*, 181 F. Supp. 386 (S.D. Cal. 1959). A result similar to *Zacks* was reached by the Second Circuit in *Hollander* v. *United States*, 248 F. 2d 247, on a similar rationale;

and filed after the running of the statute of limitations were timely. *Tobin* and *Dempster* held that the enactment of Section 117(q) did not by implication extend the ordinary limitations period; *Zacks* held that it did. The opinion of the Fifth Circuit in the *Tobin* case (upon which the Sixth Circuit exclusively relied in *Dempster*) is printed in Appendix C to this brief, pp. 31–35, *infra*.

The conflict over the limitations consequences of Section 117(q) does not, as might at first sight appear, turn merely upon a disagreement over what the substantive tax law was prior to its enactment—a disagreement which, though still a conflict, would be of considerably less current importance. While Section 117(q) was characterized by the Court of Claims as having created a new right and by the Fifth Circuit as having merely confirmed the prior case law, the two courts in fact fully agree on the state of the prior law and the substantive effect of Section 117 (q). Specifically, they agree that the decided cases were nearly unanimous in allowing capital gains treatment; that the Commissioner had stubbornly (to use the Court of Claims' characterization) and arbitrarily (to use the Fifth Circuit's) refused to follow the

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but see Judge Clark's vigorous dissenting opinion (pp. 253–256). Both *Hollander* and *Zacks* are contrary in approach to earlier decisions involving the retroactive relief accorded by Congress in 1942 in connection with deductibility of non-trade or non-business expenses, which had limited the relief accorded to that expressly provided by the statute. See *White's Will* v. *Commissioner*, 142 F. 2d 746 (C.A. 3d, 1944); *Merrill* v. *United States*, 152 F. 2d 74 (C.A. 2d 1945); *Ross* v. *United States*, 75 F. Supp. 725 (C. Cls., 1948), certiorari denied, 334 U.S. 832.

court decisions and was still maintaining a contrary position; and that the purpose of Section 117(q) was to settle the controversy once and for all by expressly rejecting the Commissioner's view.[3] What they disagree about is rather the question of statute-of-limitations law: Does a statute which retroactively resolves a live controversy over the tax treatment of an item operate to reopen the statute of limitations? The Fifth and Sixth Circuits answered that question "No" and the court below answered it "Yes"; it is there that the conflict lies.

2. Sections 322(b)(1) of the Revenue Code of 1939 and 7422(a) of the Revenue Code of 1954 (Appendix A, *infra*, pp. 20–21), provide that tax refund claims must be made within three years from the time the return is filed or two years from the time the tax is paid, whichever period expires later. Despite these express provisions, the court below held that in the case of retroactive tax relief statutes, Congress, although

[3] Thus, the Fifth Circuit in *Tobin* held that Section 117(q) "did not create the right" but "merely came to the aid of the taxpayer in rejecting as unwarranted and bringing under statutory control the commissioner's vacillating and arbitrary action in now accepting and now rejecting in regard to patents the view announced in the cases" (Appendix C, *infra*, p. 34). Similarly, the Court of Claims in *Zacks* explained that "in view of the stubborn persistence of the Bureau in its interpretation of the law, and of its refusal to follow the decisions of this court and of three of the Circuit Courts of Appeals and of the Tax Court, Congress felt it necessary to pass an Act to set aside the law as interpreted by the Bureau * * *" (Appendix B, *infra*, p. 24). And, although declaring that Section 117(q) gave the taxpayer a right he had not previously had, the court below immediately added the explanation that "[a]t least, it gave him a right which the agency charged with the administration of the prior law said he did not have." (Appendix B, *infra*, p. 25.)

not saying so, must be deemed to have intended that the limitations period should commence to run, not with the filing of the return or the payment of the tax, but with the passage of the statute. This conclusion is wholly unwarranted.

(a) A survey of retroactive tax legislation enacted in recent years convincingly demonstrates that when Congress wished to extend the statute of limitations it did so in express terms. For the period 1956 to 1962, we have found at least 36 such measures (in addition to Section 117(q)) applicable to years that would ordinarily be barred of which 24 expressly dealt with the limitations problem, and 12 did not.[4] Nine (including Section 2 of the very same Act which added Section 117(q) to the 1939 Code) provided for an additional period of either six months or one year from date of enactment for filing refund claims, and of those nine all but two prohibited the payment of any interest on refunds (and all but one specified that years settled by closing agreement or compromise were not reopened). (Category I.)[5] One measure, also prohibiting payment of interest, did not extend the limitations period commencing with its enactment, but substituted a longer period (measured from the date of filing of the return) for that provided under Section 322(b)(1). (Category II.)

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[4] See Appendix D, *infra*, pp. 36–43. In making this count, we have excluded measures such as Sections 21, 22, 31, 34, 44, 45, 51, 53 and 59 of the Technical Amendments Act of 1958, P.L. 85–866, 72 Stat. 1606, which, although effective beginning in 1954, do not appear, at least at first blush, to be retroactive tax relief measures.

[5] The statutes falling into Categories I through V are summarized in Appendix D, *infra*, pp. 36–43.

We know of five measures enacted during this time which extended the statutory period, but made no substantive change in the law. (Category III.) In addition, at least ten measures gave the taxpayer the benefit of an election affecting prior years. (Category IV.) Of these, five were specifically applicable only to open years (or years open as of a specific date); two specifically extended the period of limitations for closed years; two provided for the "tolling" of the statute; and one was silent on the limitations question. We have found eleven retroactive measures (in addition to Section 117(q) and the elective measure just mentioned) which were silent as to any extension of time for claiming refunds (all but four of which prohibited the payment of interest.) (Category V.)

As this brief summary makes clear, Congress has dealt with the limitations problem and related questions in a variety of ways—sometimes extending the existing period, sometimes tolling it, and, in many other cases, setting in motion a fresh period of one year or less commencing with the date of enactment. In light of this pattern of discriminating solutions, it seems particularly inappropriate for a court, substituting its judgment for that of Congress, to conclude that a statute which is silent on the matter must be deemed to create by implication an additional period of at least two years* for filing claims. If that interpretation were sound, then those provisions which

*In subsequent cases, the Court of Claims made it clear that the applicable limitations period (computed from the date of enactment) was to be the two-year period referred to in Section 322(b)(1), on the ground that the retroactive statute gave rise to a constructive overpayment of tax as of the date of its enactment. *Eastman Kodak Co.* v. *United States*, 292 F. 2d

specifically give the taxpayer an additional grace period of one year or less would actually operate to shorten the time that would otherwise be available for claiming a refund, and taxpayers for whom Congress made no provision for extending the statute would be treated more favorably than those for whom such provision was expressly made. We submit that a statutory construction which produces this anomalous result is wholly unacceptable.

(b) The decision below rested, in part, on the view that unless Congress intended to reopen the statute of limitations, it was an "idle gesture" to have made Section 117(q) applicable to ordinarily barred years. This reasoning, however, misconceives the character of retroactive tax relief legislation. Much of this legislation is enacted at the urging of taxpayers whose claims for refund are already pending before the Internal Revenue Service or the courts, or at least whose years are still open. In such cases, the primary purpose of the statute is often to benefit these partic-

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901, 904–905; *Lorenz* v. *United States*, 296 F. 2d 746. In an unreported decision filed July 2, 1962 (*Walter* v. *United States*, C. Cls. No. 160–61), the court dismissed as untimely a claim filed more than two years after the enactment of Section 117(q). Following this decision, four similar cases pending in the Court of Claims were dismissed either by order or stipulation: *Alfandre* v. *United States*, C. Cls. No. 209–62 (stipulation dated September 28, 1962); *Church* v. *United States*, C. Cls. No. 205–62 (order dated October 22, 1962); *Caster* v. *United States*, C. Cls. No. 469–60 (order dated October 22, 1962); *Puschelberg* v. *United States*, C. Cls. No. 101–60 (order dated November 2, 1962). Similarly, in *Smith* v. *United States*, 304 F. 2d 267, now pending on taxpayer's petition for certiorari, the Third Circuit held that even assuming that Section 117(q) created a new period of limitations, a claim filed more than two years after enactment was untimely.

ular taxpayers or to settle existing controversies and obviate the need for litigation, rather than to establish a rule of general application.[7] In effect, such statutes perform much the same function as a decision by this Court, which resolves the dispute between the parties before it but affords no benefit whatever to similarly situated persons whose right to sue has lapsed. *Cf. Kavanagh* v. *Noble*, 332 U.S. 535, rehearing denied, 333 U.S. 850.

As already noted, *supra*, pp. 2–3, 7–8, the issue resolved by Section 117(q)—whether royalties received from the transfer of all substantial rights to a patent are entitled to capital gain treatment—was hotly in dispute at the time of its enactment. A statement on the floor of Congress by the chairman of the House committee which reported the bill strongly suggests that its purpose was to eliminate the necessity for litigation by those taxpayers "still confronted with litigation for taxable years falling in this period in order to secure the rights to which the courts, with practical unanimity, have held they are entitled."[8] Certainly the bill had

[7] For a discussion of practical considerations which may enter into the enactment of legislation of this type, see Surrey, *The Congress and the Tax Lobbyist—How Special Tax Provisions Get Enacted*, 70 Harv. L. Rev. 1145 (1957).

[8] The entire statement by Chairman Cooper of the House Ways and Means Committee of the 84th Congress (101 Cong. Rec., Part 10, pp. 12708–12709) is as follows:

"Mr. Cooper. Mr. Speaker, prior to the enactment of the Internal Revenue Code of 1954, there was no statutory provision dealing specifically with the sale or exchange of patents, and the position of the Internal Revenue Service regarding the sale of patents was in opposition to the position taken by the courts. Because of this conflict, taxpayers were burdened with the necessity of litigation in order to obtain the

this effect, for a substantial number of cases pending before the courts and the Internal Revenue Service at the time Section 117(q) was enacted were subsequently settled by the payment of a full refund or the dismissal of a government appeal.[9] Plainly, a

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capital-gains treatment to which the court decisions held they were entitled. To remove the necessity of this litigation, Congress enacted section 1235 of the 1954 Code which provides that the sale or exchange of all substantial rights to a patent is to be considered as a sale or exchange of a capital asset held for more than 6 months whether or not payments are to be made periodically during the period of the transferee's use of the patent and regardless of whether the payments are contingent on the productivity, use, or disposition of the patent.

"The relief provided by section 1235 is available only with respect to amounts received in any taxable year to which the 1954 Code applies. As the result of this and the announced policy of the Internal Revenue Service to continue its insistence on its position for years beginning after May 31, 1950, and prior to effective date of the 1954 Code *taxpayers are still confronted with litigation for taxable years falling in this period in order to secure the rights to which the courts, with practical unanimity, have held they are entitled.*

"*H.R. 6143 eliminates the necessity for such litigation by making the provisions of the 1954 Code available to years beginning after May 31, 1950.*

"This bill was reported unanimously by the Committee on Ways and Means." [Emphasis supplied.]

[9] Among the cases pending when Section 117(q) was enacted which were subsequently settled by the Justice Department on the basis of that enactment by the making of a full refund, are the following: *Goff* v. *United States*, C. Cls. No. 252-56, years 1951, 1952, 1953, 1954; *Orsi-Durroni* v. *United States*, C. Cls. No. 125-57, years 1951, 1952, 1953; *A. M. Hunt* v. *United States*, N.D. Ohio, No. 33687, years 1951, 1952; *J. P. Hunt* v. *United States*, N.D. Ohio, No. 33688, years 1951, 1952; *J. H. Hunt* v. *United States*, N.D. Ohio, No. 33689, years 1951, 1952; *G. L. Hunt* v. *United States*, N.D. Ohio, No. 33690, years 1951, 1952; *C. F. Hunt* v. *United States*, N.D. Ohio, No. 33691,

statute which achieves this result cannot be considered an "idle gesture" merely because it does not also reopen barred years.

3. The decision below has important and far-reaching implications. As we have pointed out, the Court of Claims reopened the statute of limitations here even though the right conferred upon the taxpayer had been recognized by the overwhelming weight of prior case authority and contested only by the Commissioner.[10] The necessary consequence of the

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years 1951, 1952; *Hathaway* v. *United States*, C. Cls. No. 342–55, year 1951; *Hassler* v. *United States*, N.D. Calif., No. 7359, years 1951, 1952, 1953; *Garraway* v. *Manning & Lambert*, N.J., No. 849–55, years 1951, 1952; *Dalton* v. *United States*, C. Cls. No. 295–56, year 1951; *Briskman* v. *United States*, S.D. N.Y., No. 103–290, years 1951, 1952; *Cline* v. *United States*, S.D. Calif., No. 10–58–T, year 1951; *Schlenz* v. *United States*, N.D. Ill., No. 57–C–264, year 1951. Government appeals pending in the following cases, among others, were dismissed. *King* v. *United States*, S.D. Texas, No. 8316, years 1950, 1951; *Beeth* v. *United States*, S.D. Texas, No. 8399, years 1950, 1951, 1952; *Waterson* v. *United States*, N.D. Texas, No. 308, years 1951, 1952, 1953; *Commissioner* v. *Hudson*, T.C. No. 58726, years 1951, 1952. While we do not know the number of refund claims pending before the Internal Revenue Service at that time which were allowed by the Service on the basis of Section 117(q), we believe the number to have been considerable.

[10] In certain respects not pertinent to this case, Section 117(q) did effect a change in prior law. This section was patterned on Section 1235 of the 1954 Code, and, like that provision, (a) removed the distinction between professional inventors (not previously entitled to capital gain treatment because to them a patent did not constitute a capital asset) and amateur inventors, to whom the courts had accorded capital gain treatment, and (b) eliminated the requirement of a six-month holding period. In *Lorenz* v. *United States*, 296 F. 2d 746, the Court of Claims held that, as to a professional inventor even more certainly than as to an amateur, Section 117(q) created a new period of limitations. But, looking at the legislative history of

decision, therefore, is that every retroactive tax relief measure, other than one which merely restates undisputed prior law, must be deemed to set in motion, *sub silentio*, a new limitation period commencing on the date of its enactment. The rationale of this holding (and of *Verckler* v. *United States*, 170 F. Supp. 802, where the Court of Claims reached a similar result in construing a different retroactive tax relief measure)—*i.e.*, that the limitations period must be computed from the date of enactment of the statute—has become settled doctrine in the Court of Claims, which subsequently applied the principle in *Lorenz* v. *United States*, 296 F. 2d 746, *supra*, fn. 10, and, by analogy, in *Eastman Kodak Co.* v. *United States*, 292 F. 2d 901.[11] If allowed to stand, this erroneous doctrine will critically affect not only the relatively few pend-

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Section 117(q), it seems fair to state that the primary purpose of Section 117(q) was to confirm to the amateur inventor, without the necessity of litigation, the benefits to which the courts had held him to be entitled, and that the liberalization of the law with respect to professional inventors and holding period resulted incidentally from the fact that Section 117(q) was patterned after Section 1235.

[11] This case involved the question whether a suit for refund of excise taxes because of a readjustment of the sales price occurring after the taxes were paid had to be preceded by the filing of a claim for refund of taxes "erroneously or illegally assessed or collected." The Court of Claims held that it did, reasoning on the basis of what it referred to as the "*Verckler-Zacks* doctrine" and the "*Verckler-Zacks* principle," that taxes become "erroneously or illegally assessed or collected" on the date of the subsequent occurrence making them so, whether this subsequent occurrence be a readjustment of the sales price or a retroactive tax relief measure (292 F. 2d at 905–907).

ing cases under Section 117(q) itself,[12] but also claims pending under other retroactive statutes and involving millions of dollars of revenue, to say nothing of claims that will arise in future under this frequently-adopted type of legislation.

As we have shown, *supra*, pp. 9–10, Congress enacted at least 36 retroactive tax measures in the period 1956–62 (in addition to Section 117(q)), of which twelve made no provision for extending the limitations period. Under one of these twelve measures, the Retirement-Straight Line Adjustment Act of 1958,[13] we have been informed by the Internal Revenue Service that the otherwise barred claims of three taxpayers alone involve an aggregate of over nineteen million dollars[14] and that there may be other pending claims as well.

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[12] These cases are *Hobbs* v. *United States*, C. Cls. No. 144–61; *Wilson* v. *United States*, C. Cls. No. 367–61; *Turenne* v. *United States*, C. Cls. No. 96–62; *Fenn* v. *United States*, C. Cls. No. 259–61; *Vogt* v. *United States*, C. Cls. No. 154–62; and *Lorenz* v. *United States*, C. Cls. No. 277–59. On motion for summary judgment *Lorenz* was decided adversely to the Government on the limitations issue on December 6, 1961 (296 F. 2d 746) and that case is still pending before the Court of Claims on the merits. In addition, suits have recently been instituted in the Court of Claims by Aaron and Florence Zacks for the year 1951 (C. Cls. No. 340–62), and by their son, Gordon Zacks for the year 1953 (C. Cls. No. 341–62), which appear to present the same issue as is involved in this case.

[13] P.L. 85–866, 72 Stat. 1606, 1669 (Section 94 of the Technical Amendments Act of 1958).

[14] The claim of the *New York, Chicago and St. Louis Railroad Co.* now pending before the Court of Claims (C. Cls. No. 385–61) is for $1,591,089.46 for the years 1943 and 1944. Although disputed by the government, taxpayer in the cited case relies upon the *Verckler-Zacks* doctrine as dispositive. (The government contends that the governing statute repre-

The importance of the *Zacks* decision and the urgency that it be reviewed by this Court are magnified by the fact that it issues from a court which has nationwide jurisdiction (under 28 U.S.C. 1491). Since the Court of Claims is available to all taxpayers, it may be expected that most future litigation arising under retroactive tax provisions and involving refund claims which would be barred by the normal statutes of limitations will hereafter be brought exclusively in that forum, so that the courts of appeals will have little further opportunity to pass upon the issue.[14] Thus, if the instant petition for certiorari is denied, it is entirely likely that the erroneous doctrine announced by the decision below—though in direct conflict with the decisions of two courts of appeals—will become, for most purposes, the final word on this subject.

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sents approval merely of a compromise with certain railroads that had filed timely claims.) We have been advised that similar claims filed by the Pennsylvania Railroad Company (for the year 1943) for $17,039,655.60 and by the Baltimore and Ohio Railroad Company (also for the year 1943) for $604,612.49 are pending before the Internal Revenue Service.

[14] There are no pending cases involving this question in the district courts or, so far as we know, in the Tax Court, whereas 13 such cases (in addition to *Zacks*) are either pending before or have been decided by the Court of Claims. See fn. 6, *supra*, pp. 10–11, and fn. 12, p. 16. The taxpayers in *Lorenz* (see fn. 10, *supra*, p. 14), who had originally filed suit in the District Court for the Southern District of Florida (Civ. No. 8356–M), dismissed that suit without prejudice after the Fifth Circuit's decision in *Tobin*, and reestablished it in the Court of Claims. Similarly, the taxpayers in *Puschelberg* (see fn. 6, *supra*, p. 11), having originally filed suit in the District Court for the Eastern District of Michigan (No. 18918), dismissed that suit without prejudice after the Sixth Circuit's decision in *Dempster*, and reinstituted it in the Court of Claims.

CONCLUSION

There is a direct conflict of decisions which requires resolution by this Court. The issue is one concerning basic principles and of great importance in the administration of the tax law. The petition for certiorari should accordingly be granted.

Respectfully submitted.

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DECEMBER 1962.

APPENDIX A

Act of June 29, 1956, c. 464, 70 Stat. 404:

[Sec. 1.] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 117 of the Internal Revenue Code of 1939 (relating to capital gains and losses) is hereby amended by adding at the end thereof a new subsection as follows:

(q) TRANSFER OF PATENT RIGHTS.—

(1) GENERAL RULE.—A transfer (other than by gift, inheritance, or devise) of property consisting of all substantial rights to a patent, or an undivided interest therein which includes a part of all such rights, by any holder shall be considered the sale or exchange of a capital asset held for more than 6 months, regardless of whether or not payments in consideration of such transfer are—

(A) payable periodically over a period generally coterminous with the transferee's use of the patent, or

(B) contingent on the productivity, use, or disposition of the property transferred.

(2) "HOLDER" DEFINED.—For purposes of this subsection, the term "holder" means—

(A) any individual whose efforts created such property, or

(B) any other individual who has acquired his interest in such property in exchange for consideration in money or money's worth paid to such creator prior to actual reduction to practice of the invention covered by the patent, if such individual is neither—

(i) the employer of such creator, nor

(ii) related to such creator (within the meaning of paragraph (3)).

(3) EXCEPTIONS.—This subsection shall not apply to any transfer described in paragraph (1)—

(A) by a nonresident alien individual, or

(B) between an individual and any related person.

For purposes of this paragraph, the term "related person" means a person, other than a brother or sister (whether of the whole or half blood), with respect to whom a loss resulting from the transfer would be disallowed under section 24(b).

(4) APPLICABILITY.—This subsection shall apply with respect to any amount received, or payment made, pursuant to a transfer described in paragraph (1) in any taxable year beginning after May 31, 1950, regardless of the taxable year in which such transfer occurred.

Internal Revenue Code of 1939:

SEC. 322. REFUNDS AND CREDITS.

* * * * * *

(b) *Limitation on allowance—*

(1) *Period of limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 322.)

Internal Revenue Code of 1954:

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) *No Suit Prior to Filing Claim for Refund.*—No suit or proceeding shall be main-

tained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

* * * * *

(26 U.S.C. 1958 ed., Sec. 7422.)

APPENDIX B

In the United States Court of Claims

No. 104–59

(Decided July 15, 1960)

AARON ZACKS AND FLORENCE ZACKS

v.

THE UNITED STATES

ON PLAINTIFFS' MOTION TO STRIKE DEFENDANT'S SECOND DEFENSE AND DEFENDANT'S MOTION TO DISMISS PETITION

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiffs sue for the recovery of an overpayment of income taxes by reason of having reported royalties received from patents as ordinary income. They allege that the amount paid was correctly computed according to the law, as interpreted by the rulings of the Internal Revenue Bureau, at the time it was paid, but that later Congress amended the Internal Revenue Code retroactively so as to provide that the amount received as royalties should be returned as capital gains rather than as ordinary income, which resulted in an overpayment.

The defendant interposes the defense that no claim for refund of the amount of the overpayment was filed within the statutory period. Plaintiffs reply that the amendment of the Internal Revenue Code, referred to above, created a new cause of action, and that the statute of limitations did not begin to run until after its passage.

The Act upon which plaintiffs rely is Public Law 629, passed on June 29, 1956 (70 Stat. 404). It added section 117(q) to the Internal Revenue Code of 1939. This section reads:

> (q) *Transfer of Patent Rights.*—
>
> (1) *General Rule.*—A transfer (other than by gift, inheritance, or devise) of property consisting of all substantial rights to a patent, or an undivided interest therein which includes a part of all such rights, by any holder shall be considered the sale or exchange of a capital asset held for more than 6 months, regardless of whether or not payments in consideration of such transfer are—
>
> (A) payable periodically over a period generally coterminous with the transferee's use of the patent.
>
> (B) contingent on the productivity, use, or disposition of the property transferred.
>
> * * * * * *
>
> (4) *Applicability.*—This subsection shall apply with respect to any amount received, or payment made, pursuant to a transfer described in paragraph (1) in any taxable year beginning after May 31, 1950, regardless of the taxable year in which such transfer occurred. [Added by § 1 of the Act of June 29, 1956, c. 464, 70 Stat. 404]

The taxable year in question is 1952; thus, section 117(q) applies to this taxable year, and if it created a new cause of action, plaintiffs' suit is in time, having been filed just a few days less than two years from the passage of the Act.

Plaintiffs' petition alleges that the law in effect prior to the passage of the Act of June 29, 1956, was construed by the Internal Revenue Bureau to require a taxpayer to report patent royalties as ordinary income. The defendant admits this in its answer. For

the rulings of the Bureau see Mim. 6490, 1950–1 Cum. Bull. 9; Revenue Ruling 55–58, 1955–1 Cum. Bull. 97.

However, at the time of the passage of P.L. 629, *supra*, there were a number of court decisions to the contrary: *Myers* v. *Commissioner*, 6 T.C. 258; *Kronner* v. *United States*, 126 Ct. Cl. 156; *United States* v. *Carruthers*, 219 F. 2d 21 (C.A. 9th); *Commissioner* v. *Celanese Corp.*, 140 F. 2d 339 (C.A.D.C.); and *Commissioner* v. *Hopkinson*, 126 F. 2d 406 (C.A. 2d). But, notwithstanding these court decisions, the Bureau of Internal Revenue persisted in its interpretation and continued to require taxpayers to report such income as ordinary income.

It is well settled law, needing no citation of authority, that a taxpayer is bound to follow the interpretations of the law by the agency charged with its administration. This being true, plaintiffs had no option other than to report the income from patent royalties as they did report them. If plaintiffs believed that the interpretation of the law was incorrect, they were of course entitled to file a claim for refund and undertake to convince the Bureau of Internal Revenue of its error, and, in default thereof, they were entitled to bring suit to test the matter in the courts, as other taxpayers had done. The plaintiffs instead, no doubt influenced by the failure of other taxpayers to secure a reversal of the Bureau's rulings, did not question the correctness of what the governmental agency in charge of the enforcement of the law had ruled, but acquiesced in it, and paid their taxes accordingly.

Then, in view of the stubborn persistence of the Bureau in its interpretation of the law, and of its refusal to follow the decisions of this court and of three of the Circuit Courts of Appeals and of the Tax Court, Congress felt it necessary to pass an Act to set aside the law as interpreted by the Bureau, and

to expressly provide that income from royalties might be reported as capital gains.

We think this gave to a taxpayer a right that he had not had before. At least, it gave him a right which the agency charged with the administration of the prior law said he did not have.

Furthermore, we think Congress must have intended to give some taxpayers a right which it must have known had long since been barred by the statute of limitations. Public Law 629 was passed on June 29, 1956; it was made applicable to all taxable years beginning after May 31, 1950; Congress must have known that the statute of limitations, which requires the filing of a claim for refund within three years after the return was filed, or within two years from the time the tax was paid, had long since run as to many taxpayers with respect to several of the years to which Public Law 629 was applicable.

Defendant says Congress intended Public Law 629 to apply only to those taxpayers who had filed claims for refund within time. There is no such express limitation and there is nothing in the Act itself or in its history to indicate Congress had any such intention. The Act was made applicable to the barred years without restriction.

We cannot escape the conclusion that, at least insofar as taxable years barred by the statute of limitations are concerned, Congress intended by the passage of Public Law 629 to give taxpayers a right which they did not have before its passage. Had they not so intended, it was an idle gesture to have made it applicable to years as far back as 1950.

In *Verckler* v. *United States*, No. 361–57 Ct. Cl., decided March 4, 1959, 170 F. Supp. 802, we held that the remedial legislation involved in that case created a new cause of action and that a suit to re-

cover was not barred because a claim for refund had not been filed within three years from the time the return was filed, or within two years from the time the taxes were paid. The Second Circuit Court of Appeals in *Hollander* v. *United States*, 248 F. 2d 247, was of the same opinion. However, the Sixth Circuit Court of Appeals, in *United States* v. *Dempster*, 265 F. 2d 666, and the Fifth Circuit in *Tobin* v. *United States*, 264 F. 2d 845, were of a contrary opinion. We are convinced of the correctness of the view we take of the instant case and, therefore, notwithstanding our great respect for the Fifth and Sixth Circuit Courts of Appeals, we must decline to follow them.

It results that plaintiffs' motion to strike the defendant's second defense, raising the issue just discussed, must be granted. This defense will, therefore, be stricken. Defendant's motion to dismiss plaintiff's petition is denied.

The case is returned to the Trial Commissioner for further proceedings not inconsistent with this opinion.

It is so ordered.

DURFEE, *Judge;* LARAMORE, *Judge;* MADDEN, *Judge;* and JONES, *Chief Judge,* concur.

Judgment

In the United States Court of Claims

No. 104–59

AARON ZACKS AND FLORENCE ZACKS

v.

THE UNITED STATES

ORDER

This case comes before the court on a stipulation of the parties filed July 2, 1962, signed on behalf of the plaintiffs and the defendant by their respective attorneys, in which it is stated that a proposal was submitted by the plaintiffs and was duly accepted on behalf of the defendant, whereby plaintiffs agreed to accept the sum of $4,624.09, with interest thereon as allowed by law, in full settlement of all claims set forth in the petition, without prejudice, however, to defendant's right to file a petition for certiorari in the Supreme Court to review the question whether plaintiffs' claim for refund and suit herein were timely filed, and the defendant consented to the entry of judgment in that amount and upon such condition.

NOW, THEREFORE, IT IS ORDERED that judgment be and the same is entered for the plaintiffs in the sum of four thousand six hundred twenty-four dollars and nine cents ($4,624.09), with interest thereon as allowed by law.

MARVIN JONES,
Chief Judge.

JULY 6, 1962.

In the United States Court of Claims

No. 104–59

(Filed July 3, 1962)

AARON ZACKS AND FLORENCE ZACKS

v.

THE UNITED STATES

MEMORANDUM REPORT FOR JUDGMENT

To the Honorable the CHIEF JUDGE AND ASSOCIATE JUDGES OF THE UNITED STATES COURT OF CLAIMS:

The petition in the above-entitled cause was filed on March 5, 1959, to recover the sum of $10,636.06, plus interest. The claim is for the recovery of an alleged overpayment on plaintiffs' 1952 income taxes in that royalties received by them were reported as ordinary income, whereas, pursuant to Public Law 629 approved June 29, 1956, which was applicable to the year 1952, such royalties as were herein involved (i.e., paid as a result of a transfer of all substantial rights to a patent) were permitted to be reported by the inventor as long-term capital gains.

On May 4, 1959, defendant filed its answer herein in which, as a second defense, it alleged lack of jurisdiction in the court over the subject matter in that plaintiffs had not, prior to the passage of Public Law 629, filed a claim for refund of the amount of the overpayment within the statutory period and that said Public Law neither extended the time for the filing of such claims nor created a new cause of action.

On February 4, 1960, plaintiffs filed a motion to strike said second defense, and by decision of July 15, 1960, the court granted said motion and returned

the case to the trial commissioner for further proceedings.

Thereafter, a trial was had and proof was closed. However, prior to the filing of the commissioner's report, a written stipulation, signed by plaintiffs' attorney of record and by Assistant Attorney General Louis F. Oberdorfer, was filed herein, which settles all the issues in the case except the issue decided by the court. The stipulation provides as follows:

> It is hereby stipulated and agreed by and between the parties, through their respective counsel, that, pursuant to plaintiffs' proposal of December 11, 1961, as amended on June 4, 1962, accepted on behalf of defendant on June 6, 1962, the following facts may be taken as true, for the purpose of this proceeding only:
>
> 1. In their tax return filed for the calendar year 1952 plaintiffs reported $38,604.55 as income from "Royalties." Of this amount $15,035.98 was received in exchange for the transfer (other than by gift, inheritance or devise) of property consisting of all substantial rights to certain patents held by taxpayer Florence Zacks, whose efforts created such property. The transfer by Florence Zacks just referred to was to a corporation less than 50% of the stock of which she owned, directly or indirectly.
>
> 2. In their tax return filed for the calendar year 1952 taxpayers claimed a deduction of $2,169.00 for "Contributions." The plaintiffs agree that this amount may be reduced to $1,784.00.
>
> 3. In their tax return filed for the calendar year 1952 taxpayers claimed a deduction of $306.00 for "legal fee re work on patents." Plaintiffs agree that this amount may be disallowed as a deduction.
>
> 4. Upon the basis of the facts hereinabove set forth and those admitted in the pleadings,

the parties hereto consent to the entry of judgment in favor of plaintiffs in the amount of $4,624.09 with interest thereon as allowed by law in full satisfaction of the claim alleged in the petition herein.

Nothing contained herein shall be construed to prejudice the Government's right to file a petition for certiorari in the Supreme Court to review the question whether taxpayers' claim for refund and suit in the Court of Claims were timely filed. Nothing contained herein shall be construed to affect taxpayers' tax liability for any year other than 1952.

Based on the foregoing, it is recommended that an order be entered as follows:

This case comes before the court on a stipulation of the parties filed July 2, 1962, signed on behalf of the plaintiffs and the defendant by their respective attorneys, in which it is stated that a proposal was submitted by the plaintiffs and was duly accepted on behalf of the defendant, whereby plaintiffs agreed to accept the sum of $4,624.09, with interest thereon as allowed by law, in full settlement of all claims set forth in the petition, without prejudice, however, to defendant's right to file a petition for certiorari in the Supreme Court to review the question whether plaintiffs' claim for refund and suit herein were timely filed, and the defendant consented to the entry of judgment in that amount and upon such condition.

Now, therefore, it is ordered that judgment be and the same is entered for the plaintiffs in the sum of four thousand six hundred twenty-four dollars and nine cents ($4,624.09), with interest thereon as allowed by law.

Respectfully submitted.

SAUL RICHARD GAMER,
Commissioner.

APPENDIX C

In the United States Court of Appeals for the Fifth Circuit

No. 17474

KENNETH J. TOBIN AND MARGUERITE R. TOBIN, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

(March 25, 1959)

Action to recover taxes paid. The United States District Court for the Southern District of Florida, Bryan Simpson, J., dismissed the action as time-barred, and an appeal was taken. The Court of Appeals, Hutcheson, Chief Judge, held that 1956 statute dealing with transfers of patents did not establish, but merely confirmed, the already existing right to seek a timely refund, and held that such statute neither took suit for refund out of three-year statute governing overpayment of taxes nor extended period of limitation for filing claims and instituting suits for refunds.

Affirmed.

Internal Revenue ⇐1970, 2026

1956 statute dealing with transfers of patents did not establish, but merely confirmed, the already existing right to seek a timely refund, and such statute neither took suit for refund out of three year statute governing overpayment of taxes nor extended period of limitation for filing claims and instituting suits for refunds. 26 U.S.C.A. (I.R.C. 1939) §§ 117(q), 322(b)(1); 26 U.S.C.A. (I.R.C. 1954) § 7422(a).

Wm. R. Frazier, Jacksonville, Fla., Hill & Frazier, James P. Hill, Jacksonville, Fla., for petitioner.

Meyer Rothwacks, Lee A. Jackson, I. Henry Kutz, George F. Lynch, Attys. Dept. of Justice, Washington, D.C., for appellee. Edith House, Asst. U.S. Atty., Jacksonville, Fla., for respondent.

Charles K. Rice, Asst. Atty. Gen., Dept of Justice, Washington, D.C., James L. Guilmartin, U.S. Atty., Jacksonville, Fla., for appellee.

Before HUTCHESON, *Chief Judge*, and TUTTLE and JONES, *Circuit Judges*

HUTCHESON, Chief Judge: Coming here on a very small record, this appeal is from a judgment dismissing on the ground that the three-year statute of limitations, Sec. 322(b)(1) I.R.C. 1939, 26 U.S.C.A. § 322(b)(1), had barred it, taxpayer's suit for the comparatively small refund of $838.24, overpaid for the year 1951 in connection with receipts from a patent, though it is in quite small compass, it presents questions of more than ordinary interest which have been briefed and argued with care and earnestness. One of these is whether Section 117(q) 1939 I.R.C. added June 29, 1956, 26 U.S.C.A. § 117(q), and dealing with transfers of patents, created a claim against the United States taking the suit out of the three-year statute governing overpayment of taxes and entitling taxpayer to the benefit of the general six-year statute of limitations. The other, in the alternative, is whether, if this is answered in the negative, the section impliedly extended the period of limitation for filing claims and instituting suits for refunds prescribed in Sec. 322(b)(1) I.R.C. 1939 and Sec. 7422(a) I.R.C. 1954, 26 U.S.C.A. § 7422(a).

On their part, taxpayers, opposing to the opinion of the district judge in this case the contrary opinion of the district judge of the Eastern District of Ten-

nessee in *Dempster* v. *United States*, D.C., 162 F. Supp. 585, an opinion presented to and rejected by the trial court in this case, and commending the case to our favorable consideration, support it by arguments of their own generally to the same effect and, as giving sanction to this view, by citing *Philbrick* v. *Commissioner*, 27 T.C. 346 and *Rollman* v. *Commissioner*, 4 Cir., 244 F. 2d 634, cases which, as we read them, do not support it. In the alternative, and citing and quoting in support from *Thomas* v. *Mercantile National Bank*, 5 Cir., 204 F. 2d 943; *United States* v. *Dubuque Packing Co.*, 8 Cir., 233 F. 2d 453, and *Hollander* v. *United States*, 2 Cir., 248 F. 2d 247, taxpayers, assuming that the amendment of the statute was not declaratory but in derogation of the law of the cases, place their reliance upon the argument that the claimed right to refund did not exist before but was created by the amendatory statute and that it must be held therefore that the right did not accrue and limitation did not, indeed could not, begin to run until the passage of the act.

On its part the United States, taking flat issue with taxpayers' claim that the amendatory section created the right to refunds, points to *Myers* v. *Commissioner*, 6 T.C. 258; *Kronner* v. *United States*, Ct.Cl., 110 F.Supp. 730; *Commissioner of Internal Revenue* v. *Celanese Corp.*, 78 U.S.App.D.C. 292, 140 F.2d 339, and *Commissioner of Internal Revenue* v. *Hopkinson*, 2 Cir., 126 F.2d 406, to which we may add from this court, *Allen* v. *Werner*, 5 Cir., 190 F.2d 840, all pre-statute cases, and the recent case from this court of *Bannister* v. *United States*, 262 F.2d 175, Cf. *United States* v. *Carruthers*, 9 Cir., 219 F.2d 21 and *Rollman* v. *Commissioner*, 4 Cir., 244 F.2d 634. So pointing, it declares, correctly we think, that the statute in question did not establish, it merely confirmed, the already existing right to

seek a timely refund and that, under the facts and the controlling law, there is no basis for taxpayer's theory that the ordinary statute limiting claims and suits for tax refunds is not applicable.

Urging upon us that there is no basis in Sec. 322(a)(1) I.R.C.1939 for the gloss which the district judge in the *Dempster* case put on the word "overpayment", the United States points out that in *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 68 S.Ct. 229, 92 L.Ed. 142 the Supreme Court reviewed the legislative history of this section and, holding that it dealt broadly with income taxes erroneously or illegally assessed and that all income tax refund claims must be filed within three years, rejected the contention that the word "overpayment" should be narrowly or restrictively construed.

Turning to the taxpayers' second contention, that the invoked statute impliedly extended the period of limitation for filing claims by making limitation to commence to run from the passage of the Act, the United States, recognizing that there is a split in the authorities on the general point, insists that the view espoused by the majority in the *Hollander* case is not the correct one. Without ourselves undertaking to determine the correctness of taxpayers' view or of the authorities cited in support of it, based on the taxpayers' assumption that the statute created their right, we think the theory and the authorities have no application here for the reason implicit in the other cases and explicit in *Bannister's* case. This is that the invoked statute did not create the right, it merely came to the aid of the taxpayer in rejecting as unwarranted and bringing under statutory control the commissioner's vacillating and arbitrary action in now accepting and now rejecting in regard to patents the view announced in the cases. What we said there, though not said in this immediate connection,

is, we think, quite appropriate here. There, after pointing out that the statute did not create the right but was merely declaratory and in support of the right declared in the case law, the court said [262 F. 2d 177]:

> While the district judge, reciting that the realities of the situation must control did cite many of cases relied on by appellant, and did declare that the statute should receive a liberal interpretation, it seems to us that, because of the confusion brought on by the Treasury's action, the court below fell into its error. This was that in endeavoring to find in the words of the statute alone the basis for appellants' claim, whereas its real basis was in the case law, of which the statute was more or less declaratory, the court was led into a narrow, instead of a broad, construction, and thereby to deny to the undisputed facts in this case the results which, under the controlling decisions, followed from them.

The judgment was right. It is affirmed.

APPENDIX D

Retroactive Tax Measures 1956–1962

Category I

Of the nine measures falling within this category, four provided for an additional period of six months from the date of the enactment for filing refund claims, and prohibited the payment of interest on refunds. Section 14 of the Technical Amendments Act of 1958, P.L. 85–866, 72 Stat. 1606, 1611, amending Section 172(f) of the 1954 Code relating to net operating losses for years beginning in 1953 and ending in 1954; Section 36 of the Technical Amendments Act of 1958, *supra*, 72 Stat. 1606, 1633, amending Section 613 of the 1954 Code to make 1954 Code percentage depletion rates, at the election of the taxpayer, applicable to a taxable year ending after December 31, 1953, governed by the 1939 Code; Section 92 of the Technical Amendments Act of 1958, *supra*, 72 Stat. 1606, 1667, which added to the 1939 Code Section 22(p), relating to income taxes paid under contract by one corporation for another corporation, and applying to 1939 Code years ending after December 31, 1951; Section 5 of the Act of September 14, 1960, P.L. 86–780, 74 Stat. 1010, 1013, providing for the exclusion from income of moving expenses received between 1950 and 1955 by employees of certain corporations in the atomic energy field.

Three of the nine provided for an additional one-year period from date of enactment for filing claims and prohibited the payment of interest on refunds. Section 93 of the Technical Amendments Act of 1958,

supra, 72 Stat. 1606, 1668, amending Section 812(e)(1)(F) of the 1939 Code, relating to the marital deduction, and applicable to estates of decedents dying after April 1, 1948; Section 26 of the Revenue Act of 1962, P.L. 87-834, 76 Stat. 960, 1067, amending Section 188 of the 1939 Code (relating to different taxable years of partner and partnership) with respect to years after December 31, 1946; Section 27 of the Revenue Act of 1962, *supra*, 76 Stat. 960, 1067, providing for the exclusion from gross income of Japanese-American evacuation claims in years ending after July 2, 1948 (of the nine measures in this category, this was the only one silent as to the effect of closing agreement or compromise).

Two of the nine also provided for an additional one-year period from date of enactment for filing claims, but were silent as to interest. Section 2 of the Act of June 29, 1956, c. 464, 70 Stat. 404, amended Section 106 of the 1939 Code, relating to certain claims against the United States, and applied to years ending after December 31, 1948 (*this is Section 2 of the identical Act which added Section 117(q) to the 1939 Code*). Section 100 of the Technical Amendments Act of 1958, *supra*, 72 Stat. 1606, 1673, made Section 106 of the 1939 Code (so far as it related to reasonable cause for failure to file a return) applicable to years ending after December 31, 1942.

CATEGORY II

The only measure during this period which we have found which substituted a different period measured from the date of filing the return for that provided in Section 322(b)(1) is the Act of February 15, 1956, c. 36, 70 Stat. 15, amending Section 120 of the 1939 Code (and applicable to all years governed by that Code) to liberalize the unlimited deduction for char-

itable contributions, and to provide a limitations period of seven, rather than three, years from the filing of the return. That Act also provided that no interest was to be paid on the refund, and that the refund would not be made unless it would be paid forthwith as a charitable contribution.

CATEGORY III

Those measures which simply extended the statutory period for filing claims were as follows: Act of August 1, 1956, c. 857, 70 Stat. 917, which created an additional one year period from date of enactment (except where there had been closing agreement or compromise) for filing claims under the Act of October 25, 1949, c. 720, 63 Stat. 891, when such claims had been barred on the date of that enactment; Section 65 of the Technical Amendments Act of 1958, *supra*, 72 Stat. 1606, 1657, which applied with respect to decedents dying after February 10, 1939, and provided for an additional period of 60 days after notice of disallowance of a claim for refund of estate taxes, or 60 days after court decision on such claim becomes final, for filing a claim for credit for state death taxes; Section 96 of the Technical Amendments Act of 1958, *supra*, 72 Stat. 1606, 1672, which provided (except where there had been closing agreement or compromise) an additional 60 day period for filing claims for refund of income taxes based upon 1954 education expenses affected by a change of the regulations; Section 98 of the Technical Amendments Act of 1958, *supra*, 72 Stat. 1606, 1673, which provided that in the case of overpayments of income tax resulting from erroneous inclusion in income of sick pay, if claim for refund was timely filed after December 31, 1951, the period for commencing suits for refund should not expire prior to one year after that enactment; Act of September 16, 1959, P.L. 86-280, 73 Stat. 563,

in Section 1 extended the time for filing claims, with respect to net operating loss carrybacks arising from the elimination of excessive profits by renegotiation from years ending after December 31, 1952, to either September 1, 1959, or one year after the agreement or order for the renegotiation became final, whichever was later (Section 2 of the same Act directed the making of an income tax refund of $383.64 to a specific taxpayer, notwithstanding any period of limitations otherwise applicable).

CATEGORY IV

Of the ten elective measures applicable to prior years, the five specifically applicable only to open years (or years open as of a specific date) were the following: The Dealer Reserve Income Adjustment Act of 1960, P.L. 86–459, 74 Stat. 124, permitted elections with respect to all years open on June 21, 1959, and extended the period for assessment of a deficiency or filing of a claim for refund with respect to such years (unless closed by closing agreement or compromise as of the date of enactment) to September 1, 1961. Three recent percentage depletion measures permitted an election applicable to all years open on the date of enactment, and provided that the period for assessment or refund for a year affected by the election should not expire prior to one year from the last day for making such election. Section 4 of the Act of September 14, 1960, P.L. 86–781, 74 Stat. 1017, 1018 (relating to calcium carbonates); Act of September 26, 1961, P.L. 87–312, 75 Stat. 674 (relating to certain clays); Section 2 of the Act of September 26, 1961, P.L. 87–321, 75 Stat. 683 (quartzite and clay used in the production of refractory products). Section 37 of the Technical Amendments Act of 1958, *supra*, 72 Stat. 1606, 1633, also relating

to percentage depletion, had contained a similar provision permitting an election as to open years beginning with 1954.

Two of the ten specifically extended the period of limitations as to closed years. Section 29 of the Technical Amendments Act of 1958, *supra*, 72 Stat. 1606, 1626, gave the taxpayer an election to be exercised within six months from date of enactment to return to the accounting method from which he had previously changed, and also extended the period of limitations (as to assessment or refund) to one year from the date the election was made. The first section of the Act of October 23, 1962, P.L. 87–870, 76 Stat. 1158, gave terminal railroad corporations and their shareholders an election to exclude from the former's income certain "related terminal income", increasing the shareholders' income proportionately. This election could be made retroactively back to 1939, even though the years were barred, provided that (1) all parties had reported income on their returns in this manner, (2) there had been no closing agreement or compromise, (3) claim for refund was filed within one year from date of enactment, and (4) the shareholders consented to assessment of the correlative deficiencies. See also Section 99 of the Technical Amendments Act of 1958, *supra*, 72 Stat. 1606, 1673, which gave certain motor carriers an election, exercisable within one year from the date of the enactment, to accrue amounts received in settlements of claims against the United States for the taking of motor transportation systems under a 1944 Executive Order in those years when such system was in the possession of the United States; this provision was silent as to any extension of the time for filing refund claims, but did specifically extend the period for assessing deficiencies resulting from such election

to one year from the time the election was made, and also prohibited the collection of interest on such deficiency for any period prior to March 15, 1953.

Two of the ten specifically provided for the "tolling" of the statute. Section 63 of the Technical Amendments Act of 1958, *supra*, 72 Stat. 1606, 1649, relating to revocation of elections under Section 1361 of the 1954 Code (permitting certain unincorporated businesses to be taxed as corporations); Section 23 of the Revenue Act of 1962, P.L. 87-834, 76 Stat. 960, 1065, providing for the application of Section 1371(c) (relating to the definitional rules under the provisions permitting small corporations to elect to be taxed as partnerships) to years beginning after December 31, 1957.

The Retirement-Straight Line Adjustment Act of 1958, Section 94 of the Technical Amendments Act of 1958, *supra*, 72 Stat. 1606, 1669, which is involved in the *New York, Chicago, and St. Louis Railroad Co.* case now pending before the Court of Claims, was silent on the limitations question.

CATEGORY V—

Seven of the eleven retroactive relief measures which were silent as to the limitations question prohibited the payment of interest. Act of January 28, 1956, c. 18, 70 Stat. 8, which amended, with respect to computation of credits for dividends received without reduction for excess of capital gain, Section 117 (c)(1)(A) of the 1939 Code, and applied to years beginning after December 31, 1951; Act of February 20, 1956, c. 66, 70 Stat. 26, which amended the 1939 Code by adding Section 814, relating to a credit for certain prior transfers in the case of decedents dying after December 31, 1951; Section 3 of the Act of June 29, 1956, c. 464, 70 Stat. 404, which added to the 1939 Code, effective as of the Code's enactment, Sec-

tion 115(n), relating to distributions by corporations; Act of February 11, 1958, P.L. 85–318, 72 Stat. 3, which amended Section 812(e)(1)(D) of the 1939 Code with respect to decedents who were adjudged incompetent before April 2, 1948, and was applicable to estates of decedents dying after that date; Section 103 of the Technical Amendments Act of 1958, *supra*, 72 Stat. 1606, 1675, amending Section 131(e) of the 1939 Code, with respect to the foreign tax credit for United Kingdom income tax paid with respect to royalties, and applicable to taxable years beginning January 1, 1950; Act of February 11, 1958, P.L. 85–319, 72 Stat. 4, which amended Section 223 of the Revenue Act of 1950, c. 994, 64 Stat. 906, relating to personal holding company income, to make it applicable to years ending in 1954 governed by the 1939 Code; Act of August 7, 1959, P.L. 86–141, 73 Stat. 288, which amended Section 2038 of the 1954 Code (relating to revocable transfers) with respect to the effect of a disability beginning prior to October 1, 1947, and ending at death, and was applicable to estates of decedents dying after August 16, 1954.

Four (in addition to Section 117(q).) were silent as to interest, as well as limitations. Section 1 of the Act of February 20, 1956, c. 63, 70 Stat. 23, amending Section 208(b) of the Technical Changes Act of 1953, c. 512, 67 Stat. 615, to make it effective with respect to decedents dying after December 31, 1947, instead of December 31, 1950; Section 30 of the Revenue Act of 1962, *supra*, 76 Stat. 960, 1069, making Section 2(b) of the Act of September 23, 1959, P.L. 86–376, (73 Stat. 699), permitting a net operating loss of a small business corporation to be allowed as a deduction in the final taxable year of a shareholder who dies before the end of the corporation's taxable year, applicable as of September 2,

1958, rather than September 24, 1959, as that Act had provided; Section 5 of the Act of September 14, 1960, P.L. 86–781, 74 Stat. 1017, 1019, giving named pension trusts exemption from taxation for specified prior periods; Sections 1 and 4 of the Act of June 27, 1961, P.L. 87–59, 75 Stat. 120 (semble).

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